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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-289

HALE HOSPITAL, CHARLES F. STUMPF, JOHN C. T. MacNAMARA, JOHN DROSSOS, ELLERY ATWOOD, HOMODE J. HABHAB, MARY FUTRELL, WILLIAM H. GLEED, SHELDON G. MERKER, CLIFFORD A. MILES and ALFRED E. LAGASSE,
PETITIONERS,

v.

JANE DOE and REBECCA ROE,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioners hereby petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit affirming the judgment of the United States District Court for the District of Massachusetts obligating the Petitioners to make its facilities available to women seeking first trimester abortions.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reproduced herein as Appendix A, Page 10. That opinion has not been officially reported as of the date of this Petition.

The opinion of the United States District Court for the District of Massachusetts, in which court this case arose, is reproduced herein as Appendix B, Page 17. That opinion has been officially reported and appears as *Jane Doe et al* v. *Hale Hospital et al,* 369 F. Supp. 970 (D. Mass. 1974).

Jurisdiction

The judgment sought to be reviewed was entered July 12, 1974 in the United States Court of Appeals for the First Circuit.

Jurisdiction to review the judgment is conferred on this Court by 62 Stat. 928, 28 U.S.C. § 1254(1), which provides:

> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Questions Presented

1. Did the Court of Appeals err in upholding the order of the District Court requiring the Petitioners to make its facilities available to women seeking first trimester abortions despite the absence of a showing of any substantial deprivation of Respondents' fundamental right to obtain an abortion in the Commonwealth of Massachusetts?

2. Did the Court of Appeals err in upholding the order of the District Court requiring the Petitioners to make its facilities available to women seeking first trimester abortions when the stipulated or uncontroverted facts showed that the Hospital is operating at full capacity and cannot provide additional services without reducing or eliminating existing services?

Constitutional Provisions Involved

AMENDMENT 10

The powers not delegated to the United States by the Constitution, nor prohibted by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT 14

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Statement of Case

The Petitioners are the Hale Hospital, a public hospital owned by the City of Haverhill, Massachusetts and operated by a Board of Trustees, the Director of the Hospital and the members of its Board of Trustees.

The pseudonymous Respondents Jane Doe and Rebecca Roe were in their first trimester of pregnancy and had consulted a licensed physician specializing in obstetrics and gynecology who determined an abortion to be in their best interest.

On May 21, 1973, the physician scheduled the performance of elective abortions on Respondents Doe and Roe at Hale Hospital. On the same day the Hospital director

cancelled the operations. Respondents brought a civil rights class action suit in the United States District Court for the District of Massachusetts seeking declaratory and injunctive relief against the rules, practices and policies of the Hospital which allegedly infringed their right of privacy associated with their decision to terminate their pregnancy and denied them equal protection of the laws.

On May 23, 1973 the District Court granted temporary restraining orders in favor of each of the Respondents pursuant to which each had an abortion performed at the Hale Hospital. On July 10, 1973 Jane Doe II, III, IV and V filed motions to intervene which were allowed. On July 31 the non-jury trial was held. On January 30, 1974 the District Court filed an opinion and entered an order barring the individual Petitioners from enforcing rules forbidding the use of the Hospital facilities for elective abortions.

On February 28, 1974 the Petitioners filed their notice of appeal and on July 12, 1974 after hearing the United States Court of Appeals for the First Circuit affirmed the order of the District Court.

Reasons for Allowance of the Writ

This case raises important questions of constitutional law which have not been but should be settled by this Court. This Court has clearly established the limited fundamental right of a woman to terminate her pregnancy in *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973); but the Court has not provided an analysis of the nature of the concomitant duty of health-care facilities like Petitioners' to provide for such procedures. The resolution of this issue is of vital importance not only to the Petitioners but to hundreds of similar health-care facilities in the First Circuit, which are sub-

ject to the ruling of the Court of Appeals in this case and to their counterparts in the other circuits which are similarly without guidance.

The particular question presented in this case is simply whether, in light of the availability of many alternative facilities which offer to provide first trimester abortions to the Respondents and in light of the critically overcrowded and cramped conditions existing at this time at this particular hospital, it is justified in promulgating a regulation excluding for the present time the performance of first trimester abortions. This question is not an attempt to raise the issues settled by the Court in *Roe* v. *Wade*. Neither criminal anti-abortion statutes, nor other statewide legislation of any type pertaining to abortions is involved. Neither is this a case, like that alluded to by this Court in *Doe* v. *Bolton*, supra at 198, where Respondents although possessed of the fundamental rights to choose to terminate a pregnancy, are frustrated in their attempts to exercise that right because of the lack of available facilities or burdensome restrictions on their use. Since March 1973 there have been performed within the Commonwealth of Massachusetts nearly twenty thousand abortions. See Appendix C. There are at present in the Commonwealth of Massachusetts over fifty-five licensed facilities reporting performance of first trimester abortions. See Appendix D. These facilities are located throughout the state, are convenient to large population centers and have no burdensome restrictions on their use. There is no question that Petitioners have available to them a number of such facilities which are fully capable of performing abortions safely, quickly and inexpensively.

At issue in this case is the regulation of a single municipal hospital. With respect to this regulation the undisputed facts show that the hospital has the staff and facilities to provide it with the capability to perform the relatively simple surgical procedures required for abor-

tions. The problem which the hospital faces is its cramped and outmoded facilities which have the effect of limiting the hospital's capacity to perform the services for which it has the capability.

The undisputed facts with reference to the hospital's capacity include an occupancy rate for adult medical-surgical care of between 95% to 96% of its capacity. Last minute cancellations or postponements which cannot be rescheduled account for the 4% to 5% vacancy rate, so that for all practical purposes the hospital medical-surgical facilities presently operate at their full capacity. It is these facilities which must be used to perform abortions. Evaluations of the facilities in general at the hospital by state regulatory agencies, voluntary organizations dealing with hospital accreditation and private surveys reveal that they are outmoded and provided only about 50% of the space normally required for a hospital of its 200 bed capacity. Use of the operating room facilities are congested and regulated by schedule allocating certain times to various groups of doctors. Often surgical procedures must be rescheduled or cancelled because of lack of availability of operating room facilities. The out-patient facilities are equally congested and outmoded. Patients at this facility have had to change clothes in a broom closet and wait in corridors for medical attention. Because of the severe congestion existing at the Hospital no new or additional services or procedures of any type have been added to Hale Hospital in recent years.

The establishment of an elective abortion program will have the effect of greatly increasing the demand for the use of the adult medical-surgical facilities, the operating rooms and the out-patient facilities, all of which are already operating at or close to capacity. Based upon population figures, the hospital can expect an increased caseload of between 300 and 400 abortions. The purpose and the effect of the regulation at issue in this case is not to prohibit or restrict the performance of abortions but to

permit a shift of this extra caseload from a facility which cannot accept it to other facilities within the state which can. The Court of Appeals has denied that a serious dislocation of hospital services will result by mandating the hospital to perform elective abortions because the mandate would require the hospital to do so only on the same terms as it performs other medically indistinguishable procedures. However it is clear that by preventing this facility, which is already operating at capacity, from shifting off the substantially increased caseload to alternative facilities through regulation of the type of procedures it will perform, the Court of Appeals has forced one of two results. Either the facility must be expanded to meet the increased demand or it must cut back on its existing services if it is to perform elective abortions at all. Since the lower courts have acknowledged they cannot mandate an expanded facility, the only remaining alternative is to cut back on services and to cancel or postpone other procedures which require the use of the facilities needed for elective abortions. Compare *Nyberg* v. *City of Virginia*, — F.2d — (No. 73-1686 (8th Cir. 1974).[1]

Such a course of action would be a great hardship on a community like Haverhill, because this is the only local general-purpose hospital. The nature of this hardship be-

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[1] The Court of Appeals dismissed consideration of a further factor which distinguishes the performance of elective abortions from other medical procedures at Hale Hospital, in that this procedure is one where doctors, nurses and other support personnel may refuse to participate for religious or moral reasons. (Opinion Footnote 2, Page 5). See *Doe* v. *Bolton*, supra, at 200. See ch. 521 of the Acts of 1973 of the Commonwealth of Massachusetts. This factor adds additional serious personnel scheduling problems to the implementation of any elective abortion program so as to make unrealistic any comparison between the performance of elective abortions and other medical procedures at Hale Hospital.

comes clear when the availability of alternative facilities for the abortion patient using the limited Hale Hospital facilities is compared to the lack of alternatives which may be available to a general medical-surgical patient whose operation has been cancelled or postponed to make room for the abortion patient.

In reaching its decision the Court felt bound by certain language in *Roe* v. *Wade* providing that during the first trimester of a woman's pregnancy a physician in consultation with his patient is free to determine that the patient's pregnancy should be terminated by an abortion free of interference by the state and to terminate the pregnancy free of regulation by the state. This language was construed by the Court to have general application to a municipal hospital so as to prohibit the regulation at issue. In reaching this conclusion the Court erred because of the absence of any proof that the action of the Board of Trustees was a significant interference with or regulation of the Respondents abortion decision or their ability to obtain abortions.

The regulation promulgated by the Board of Trustees was one made in its proper and traditional role of allocating a community's limited health care resources in the most efficient possible way to provide the maximum amount of health care service to the community within the limitation of budget, personnel and plant capacity. It has always been the role of the State to provide for the health, welfare and general comfort of its citizens. *Gibbons* v. *Ogden*, 9 Wheat. 1, 205 (1824); *Louisiana* v. *Texas*, 176 U.S. 1, 21 (1900). Over the years it has become an area of increasing concern for the states. *McGowan* v. *Maryland*, 366 U.S. 420, 445 (1961). The investing of the responsibility of allocating community health care resources in local bodies has been recognized and approved. *Jacobson* v. *Massachusetts*, 197 U.S. 11, 25 (1905). It is a reasonable exercise of that power to limit the use of the facility when it is operating at its capacity and there

are numerous alternative facilities established or regulated by the State which provide the patient with the services she seeks. This Court has recognized that propriety of the use of alternative facilities. *Roe* v. *Wade,* supra at 146. See Uniform Abortion Act quoted by the Court in *Roe* v. *Wade.* It has also noted the right of the community to regulate its health-care facilities when they are operating at capacity, *Doe* v. *Bolton,* supra at 200.

This Court has warned lower courts against interfering with state health regulations without sound basis for such interference; *Compagnie Francaise* v. *Louisiana State Board of Health,* 186 U.S. 380, 392-393 (1901) or on account of minor restraints or burdens necessitated for the general good. *Jacobson* v. *Massachusetts,* supra at 26.

By striking down this regulation and forcing the hospital to perform first trimester abortions, without at least requiring the Respondents to have made a clear showing that there has been a "real abridgement" *Kovacs* v. *Cooper,* 336 U.S. 77, 85 (1949) or a "substantial restraint" *NAACP* v. *Alabama,* 357 U.S. 449, 462 (1958) or a "substantial governmental interference" *Bates* v. *Little Rock,* 361 U.S. 516, 524 (1960) with a fundamental right, the Court of Appeals erred.

Conclusion

For the reasons stated, it is respectfully prayed that this petition for a writ of certiorari be granted and that the decision of the Court of Appeals be reversed and that the judgment and order of the District Court be vacated.

Respectfully submitted,

Moulton, Looney, Mazzone, Falk
& Markham
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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 74-1078

JANE DOE, ET AL.,
PLAINTIFFS, APPELLEES,
v.
HALE HOSPITAL, ET AL.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Robert D. City, with whom *A. David Mazzone* and *Moulton, Looney, Mazzone, Falk and Markham* were on brief, for appellants.
Nancy Gertner, with whom *Silverglate, Shapiro & Gertner, John Reinstein, James Hamilton*, and *Hamilton and Lamson* were on brief, for appellees.

July 12, 1974

COFFIN, *Chief Judge*. Once again this court is faced with a legal repercussion of the landmark Supreme Court decisions in *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973). This time, as in *Hathaway* v. *Worcester City Hospital*, 475 F.2d 701 (1st Cir. 1973), we face the question of the obligation of a public hospital to make its facilities available to women seeking abortions.

The pseudonymous plaintiffs, Jane Doe and Rebecca Roe, and plaintiff-intervenors, Jane Doe II, III, IV, and V, at the time they became plaintiffs, were pregnant and had con-

sulted a licensed physician who had found an abortion in their best interest. Although class action status was sought on behalf of a class consisting of women in both first and second trimesters, the district court ruled that since all of the original and intervening plaintiffs were in their first trimesters, class action would be allowed, but restricted to those in their first trimester. The suit is a civil rights action seeking declaratory and injunctive relief against rules, policies and practices of defendants restricting use of the facilities of the Hale Hospital for the performance of abortions, which rules, practices and policies are alleged to infringe rights of privacy associated with the decision of a woman to terminate her pregnancy, and are also alleged to deny equal protection of the laws, all in violation of the United States Constitution.

Defendants are the Hale Hospital, a public hospital owned by the city of Haverhill, Massachusetts, and operated by a Board of Trustees (appointed by the mayor of the city), the Director of the Hospital, and the members of its Board of Trustees. For some time Hospital rules have permitted the performance of "therapeutic" abortions, but have forbidden "elective" ones.[1] After the Supreme Court had handed down its abortion decisions the Executive Committee of the Hale Hospital Medical Staff, on February 22, 1973, issued a report to the Hospital Trustees informing the trustees that the hospital possessed adequate medical staff expertise, adequate physical facilities, and adequate sup-

[1] Under the Hospital's rules an abortion will be permitted if, in the judgment of the Hospital's Therapeutic Abortion Committee, "continued pregnancy in the presence of serious disease constitutes a significant threat to the life or health of the mother." Such we shall refer to as a "therapeutic abortion," using "elective abortion" to describe an abortion which would not be approved by the hospital rules. Defendants do not claim that, if *Roe* v. *Wade* and *Doe* v. *Bolton* require that Hale Hospital allow performance of abortions, its Therapeutic Abortion policy would be in compliance with the requirements of those cases.

portive personnel for the performance of elective abortions, and that the pertinent guidelines promulgated by the state Department of Public Health would be met by existing hospital regulations and practices. After approval of the report by vote of the medical staff it was submitted to the Board. On March 29, 1973 the Trustees voted first to allow elective abortions to be performed at the Hospital, but second that implementation of the new policy be deferred until certain matters could be clarified. The City Council of Haverhill then asked the Hospital Trustees to reconsider their decision concerning abortions and on April 9, 1973 the trustees voted to table implementation of the abortion policy approved on March 29 until answers to questions concerning the matter could be received from the state Attorney General and from the leaders of the state Senate and House of Representatives.

On May 21, 1973, Dr. Baratt, a specialist in obstetrics and gynecology and a member of the staff of the Hale Hospital, scheduled the performance of elective abortions upon the two original plaintiffs at the Hospital. On the same day the Hospital Director cancelled the scheduled abortions on the grounds that the Trustees of the Hale Hospital did not permit elective abortions to be performed. Thereafter, on June 26, 1973, the Trustees clarified matters by voting unequivocally to bar the performance of elective abortions at the Hospital.

The district court granted temporary restraining orders in favor of each of the plaintiffs pursuant to which each had an abortion performed at the Hale Hospital. Thereafter the court issued a permanent injunction barring the individual defendants, individually or collectively, from enforcing rules and policies forbidding the use of the Hospital's facilities for elective abortions. Although the court's order is worded broadly its opinion is confined to consideration of first trimester pregnancies only. "The outcome", in

the words of the court, was "inexorably indicated on the basis of a syllogism whose major premise is the opinion of the Supreme Court of the United States in *Roe* v. *Wade* [*supra*] and whose minor premise is the opinion of the United States Court of Appeals for the First Circuit construing *Roe* v. *Wade* in the context of a publicly-supported municipal hospital . . . . [I]n *Hathaway* v. *Worcester City Hospital* [*supra*] . . .". We agree.

It is undisputed that the Hospital permits use of its facilities for the performance of medical procedures which are in the same general area of medical practice as are abortions, some of which expose the patient to greater risk and impose a greater demand upon the resources of the Hospital, and at least one of which is practically identical to the procedures used to perform a first trimester abortion. Indeed, at the time that the performance of the kinds of abortions sought by plaintiffs was barred, the Hospital, as we have noted, permitted therepeutic abortions to be performed. Thus, it is clear that on a medical basis elective abortions are indistinguishable from procedures permitted and performed at the Hale Hospital, and that what we said in *Hathaway* v. *Worcester City Hospital, supra,* is fully relevant here:

> "[O]nce the state has undertaken to provide general short-term hospital care, as here, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights." 475 F.2d at 706.

See also Nyberg v. *City of Virginia*, ... F.2d . . . . . (No. 73-1686, 8th Cir. 1974).

Defendants seek to distinguish *Hathaway* on two grounds which were not explicitly presented in that case.[2] First,

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[2] Defendants also point to Chapter 521 of the Massachusetts Acts of 1973 which was passed subsequent to our decision in *Hathaway*. However, that law refers only to the rights of "privately

defendants assert that plaintiffs do not present here a substantial enough deprivation of their rights to justify relief. They claim that elective abortions are available to plaintiffs in clinics or hospitals in Boston, and that the effect of Hale Hospital's ban on such abortions is merely to "require . . . some extra travel." We need not determine whether there may exist situations where the practical impact of a restriction upon abortions would be so insignificant that constitutional scrutiny would not be triggered. That is certainly not the situation here. No other hospital or clinic exists in the city of Haverhill for the performance of elective abortions and the record reveals that other hospitals in the Hale Hospital primary service area also do not permit such abortions. In addition, plaintiffs' physicians are members of the staff of the Hospital, and there is therefore clear advantage in the use of its facilities. As the Supreme Court made clear in *Doe* v. *Bolton,* it is not only complete proscription of abortion which is unconstitutional, but barriers which "unduly restrict" the rights of the woman, *see* 410 U.S. at 198. That there has been restriction of the rights of women who seek elective abortions in Hale Hospital is clear. Whether these restrictions are undue requires consideration of defendants' second ground of defense.

While not denying that the Hospital possesses the staff and facilities to perform elective abortions, defendants argue that the addition of this kind of procedure to those already performed at the Hospital would severely tax already strained resources. In particular, the physical facilities are said to be unable to bear any major additional load

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controlled" hospitals or other health facilities and thus has little relevance here. While the Massachusetts law also permits individuals associated with any hospital to decline to participate in the performance of an abortion on moral or religious grounds, there is no evidence that severe disruption of hospital routine leading to endangerment of the safety of patients will result from the possible need to accommodate the moral or religious convictions of hospital staff.

without causing significant problems. However, other than the fact that they have not been allowed before, no reason is given why elective abortions are, on a medical basis, the most appropriate class of procedure to be sacrified as a result of overcrowding of hospital facilities. And it cannot be argued that, by permitting elective abortions, patients whose conditions are more serious from a medical standpoint will be disadvantaged, since plaintiffs do not seek to displace such patients. All that is sought is that elective abortions be accorded the same standing as other procedures of a similar medical nature.

Under these circumstances the impact upon the Hospital and its patients will at worst be some increment in the delay in scheduling elective medical procedures, and perhaps an increase in the incidence of schedule cancellation of such procedures with the inconvenience of having to reschedule them. This is a matter of valid concern to hospital administrators, but it is far from the kind of compelling interest that must be demonstrated when rights are at stake which are " 'fundamenal' or 'implicit in the concept of ordered liberty' ", *Roe* v. *Wade, supra,* 410 U.S. at 152. Therefore, the restrictions placed by the Trustees of the Hale Hospital upon the rights of women to determine whether or not to have an abortion are "undue" in the sense that they are well beyond that needed to preserve a compelling state interest,[3] with the consequence that constitutionally protected rights have been denied.

We wish to reaffirm what the district court was careful to point out, that its order "in no way impinges upon the authority of the hospital Trustees and the Director of the

[3] In *Doe* v. *Wohlgemuth*, 42 U.S.L.W. 2589 (W.D. Pa. May 3, 1974) (three judge court), Pennsylvania's failure to include "elective" abortions in the coverage of the state's medical assistance program (providing reimbursement for certain medical costs of indigents) was found unconstitutional, despite the state's claim that its exclusion of such abortions conserved hospital space and state funds.

hospital to make hospital facilities available to persons seeking elective abortions only on the same terms and subject to the same conditions as those imposed upon other would-be users of the hospital facilities. Nor does this order require that any individual member of the staff of Hale Hospital, or any employee of Hale Hospital, participate or assist in any way in the performance of these abortions if that person as a matter of conscience objects to so doing." Moreover, as we said in *Hathaway* v. *Worcester City Hospital*, "we are not mandating the city or state to maintain this hospital, or to retain its present size, staff, or facilities. The hospital is not required to perform all kinds of nontherapeutic or even all therapeutic surgical procedures." 475 F.2d at 706. Although thus limited, our holding is not to any degree diminished in force or in importance. A public medical facility, like the Hale Hospital, may not forbid elective abortions so long as it offers medically indistinguishable procedures, without violating the fundamental rights associated with the decision to terminate pregnancy set out in *Roe* v. *Wade* and *Doe* v. *Bolton*.

Affirmed.

APPENDIX B

Civil Action No. 73-1587-C

JANE DOE, ET AL

v.

HALE HOSPITAL, ET AL

OPINION

January 30, 1974

CAFFREY, CH.J.

This is a civil rights action filed in the name of "Jane Doe and Rebecca Roe," brought pursuant to 42 U.S.C.A. §1983 against the Hale Hospital (a public hospital operated by the City of Haverhill, Massachusetts), the hospital Director and the members of the Board of Trustees of the Haverhill Municipal Hospitals. Jurisdiction of this Court is invoked on the basis of 28 U.S.C.A. §1343 and 28 U.S.C.A. §2201-2202. Plaintiff Doe is a resident of the Commonwealth of Massachusetts whose true identity is a matter of impounded record in the file hereof, and plaintiff Roe is a resident of the State of New Hampshire whose true identity is also a matter of impounded record. Subsequent to the filing of the case, motions to intervene on behalf of Jane Doe II, Jane Doe III, Jane Doe IV, and Jane Doe V were allowed, as was a motion granting them leave to proceed herein without disclosing their true names on the public record, although their identities are on file and impounded.

Plaintiffs seek declaratory relief in the nature of a court order declaring that "the rules, policies and practices of the defendant hospital, its Director and its Board of Trustees, which prohibit the use of the hospital's facilities for elective abortions are unconstitutional in that they violate the right of plaintiffs . . . to privacy in matters respecting marriage, sex and procreation which is guaran-

teed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States." Plaintiffs also seek a declaration that said rules, policies and practices deny plaintiffs equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution, and plaintiffs seek a permanent injunction against the enforcement of said rules, regulations, policies and practices prohibiting or unnecessarily restricting elective abortions at the Hale Hospital.

Plaintiffs allege that they bring this suit as a class action "on behalf of a class consisting of all women who wish to terminate their pregnancy in the first and second trimester of pregnancy by non-therapeutic or elective abortions." Affidavits filed by the six plaintiffs disclose that at the time they became plaintiffs two of the plaintiffs were in the sixth week of pregnancy, three were in the eighth week, and one was in the tenth week of pregnancy. Because none of the plaintiffs was in the second trimester of her pregnancy at the time she joined the case as a party plaintiff and because of the substantial medical differences between the situation of a woman in the first trimester as distinguished from a woman in the second trimester of pregnancy, I rule that this is a class action brought on behalf of women in the first trimester of their pregnancy, and I further rule that plaintiffs have not shown that they have satisfied the requirements of Rule 23, Federal Rules of Civil Procedure, for treating this matter as a class action on behalf of women in the second trimester of pregnancy.

The case was tried by the Court without a jury and at trial the following relevant and material facts were stipulated: Each plaintiff consulted with and was examined by either Dr. Theodore Baratt or Dr. Gary Kraus. Both doctors are physicians licensed by the Commonwealth of Massachusetts, and are members of the medical staff of Hale Hospital. Each is a specialist in obstetrics and gyne-

cology, certified by the American Board of Obstretrics and Gynecology. At the time that each of the six plaintiffs sought an abortion, the examining physician determined that she was pregnant. Each plaintiff advised the examining doctor that she wished to terminate her pregnancy by means of an elective abortion, and as to each plaintiff the examining doctor's medical judgment was that an abortion was in her best interests.

The Hale Hospital is a public hospital facility owned by the City of Haverhill, Massachusetts. Its operation is supervised and controlled by the members of a Board called the "Trustees of Municipal Hospitals of Haverhill." The members of this Board are appointed by the Mayor of Haverhill. Authority for the approval of the hospital's budget rests with the Mayor and the City Council of Haverhill.

On March 29, 1973, the Hale Hospital Board of Trustees voted that elective abortions be allowed to be performed at the Hale Hospital. At the same meeting the trustees voted that "implementation of the policy to allow abortions be deferred pending further clarification of proposed guidelines." On April 9, 1973, following receipt of a request from the Hale Hospital to reconsider their decision, the Trustees voted to table implementation of the abortion decision until specific answers were received from the Attorney General of Massachusetts and the leaders of the Massachusetts Senate and House of Representatives clarifying the issue. On May 21, 1973 Dr. Baratt scheduled the performance of an elective abortion at Hale Hospital upon plaintiffs Doe and Roe. On the same day the hospital cancelled the scheduled abortions on the grounds that elective abortions were not permitted by the hospital Trustees. On June 26, 1973, the Board of Trustees voted to bar the performance of elective abortions. Therapeutic abortions are presently performed at the Hale Hospital

subject to the approval of the hospital's Therapeutic Abortion Committee.

The Hale Hospital consists of seven buildings in which approximately 202 beds are available for in-patient care. In the calendar year 1972, there were 9195 in-patient admissions which averaged a stay of between six and seven days. In the years 1969 through 1972, hospital bed occupancy was at the rate of 83 per cent of available beds. The 9195 inpatient admissions in 1972 break down percentagewise as follows:

Surgical	43%
Medical	32%
Obstetrical	16%
Pediatric	9%

and the outpatient "admissions" numbered 31,306.

The primary service area of the Hale Hospital includes the City of Haverhill, Massachusetts and the towns of Merrimac, West Newbury, Groveland and Georgetown, Massachusetts, as well as the towns of Atkinson, Hampstead, Plaistow and Newton, New Hampshire. 87% of the inpatient admissions reside in the primary service area and 90% of the outpatient cases are residents of the primary service area. Residents of Haverhill itself account for between 65 and 69 per cent of the inpatient admissions and 70 percent of the outpatient cases. In 1972 there were 4866 surgical procedures performed at the Hale Hospital. These included 2276 major operations, 2020 minor operations, 79 outpatient cases and 491 sterilizations. In the first six months of 1973 there were 1173 major operations, 1065 minor operations, 87 outpatient visits, 321 sterilizations and 6 elective abortions. All six of the elective abortions involved females in the first trimester of their pregnancy.

In addition to the above-recited stipulated facts, all of which I find, I also find on the basis of the testimony of

Hospital Director Charles F. Stumpf, that the occupancy rate for the operating room at Hale was substantially higher than the occupancy rate for the 202 available beds; namely, there was a 95 to 96 per cent use of the operating facilities during the year 1972.

Dr. Baratt testified that it was his opinion that there is a lack of significant medical difference between an abortion and a dilation and curettage during the first trimester of pregnancy. On the basis of the testimony of Dr. Daniel R. Taffe, Jr., Chief of Staff of Hale Hospital, whose specialty is obstetrics and gynecology, I find that during the first trimester an abortion is usually accomplished through the use of a procedure called dilation and curettage, that this procedure cannot be used in the second trimester, and that there is "very definitely a difference in risk between an elective abortion in the first trimester and one in the second trimester," and that the methods which have to be employed as a rule in the second trimester are "fraught with much more medical complication and surgical complication."

On the basis of the testimony of Dr. Baratt I find that an elective abortion normally involves the services of the attending doctor and one nurse, that it is handled the majority of the time on an outpatient basis, and that the facilities therefor at Hale Hospital meet the requirements outlined in the guidelines of the Massachusetts Department of Public Health. Dr. Baratt also testified that sterilization is "far more complicated than an elective abortion," and that a hysterectomy is also "far more difficult than an elective abortion."

Exhibit G establishes the fact that on February 22, 1973 the Executive Committee of the Hospital met and voted that the Hospital had adequate facilities for the requirements of the state Department of Public Health. The Executive Committee did not on that occasion take a

position favoring or disfavoring the performance of elective abortions, but did go on record to inform the staff and the Board of Trustees that in its opinion the institution had full capability for performing elective abortions. If material I find that the Hale Hospital permits sterilizations, hysterectomies, therapeutic abortions and other surgical procedures which are directly related to the patient's interest in sex, marriage and procreation and which procedures carry a greater risk of physical harm to the patient and impose a greater demand on the hospital facilities and personnel.

If material I find that there is one hospital in Salem, one hospital in Beverly, two hospitals in Lynn, and one hospital in Peabody, which allow elective abortions, and that these seem to be the only hospitals in that area of Massachusetts northeast of Boston which allow this procedure. In Hale Hospital's primary service area there are virtually no facilities for elective abortions and none are being performed in the primary service area since this procedure is not allowed at the Anna Jacques Hospital in Newburyport, the Amesbury Hospital in Amesbury, the Lawrence General Hospital in Lawrence or the Bon Secours Hospital in Methuen.

Taking the above facts, all of which were either expressly stipulated or are established by evidence or testimony that, in fact, was not controverted, the outcome of this case would appear inexorably indicated on the basis of a syllogism whose major premise is the opinion of the Supreme Court of the United States in *Roe* v. *Wade*, 410 U.S. 113 (1973) and whose minor premise is the opinion of the United States Court of Appeals for the First Circuit construing *Roe* v. *Wade* in the context of a publicly-supported municipal hospital, supplemented by the unchallenged fact that Hale Hospital is a publicly operated and financed municipal hospital, with the in-

evitable conclusion that because it is a publicly operated and financed municipal hospital action of the Trustees constitutes "state" action for purpose of application of the rule of *Roe* v. *Wade*.

In *Roe* v. *Wade, supra*, the majority opinion of the Court announced, at p. 153:

> "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

at p. 154:

> "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."

at p. 159:

> "The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus... [I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.... We need not resolve the difficult question of when life begins..."

at p. 162:

> "... the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman... and... it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.' "

and at p. 163:

> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester...
>
> "This means... that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."

From the above quotations from *Roe* v. *Wade,* the major premise of the above referred to syllogism emerges as a statement by the Supreme Court of general application that during the first trimester of a woman's pregnancy a "physician, in consultation with his patient, is free to determine that the patient's pregnancy should be terminated... by an abortion free of interference by the State." It would appear to require no demonstration that an order, regulation or policy of hospital Trustees which totally prohibits elective abortions amounts to "interference by the State," and also amounts to "regulation by the State," if the action of those hospital Trustees may properly be characterized as "state action for purposes of the *Roe* v. *Wade* ruling.

The opinion of Chief Judge Coffin in *Hathaway* v. *Worcester City Hospital,* 475 F.2d 701 (1 Cir. 1973), clearly and unambiguously amounts to a ruling that action by the Trustees of the Worcester City Hospital is "State" action for purposes of application of the rules of *Roe* v. *Wade* and *Doe* v. *Bolton,* 410 U.S. 179 (1973). Judge Coffin stated for the court, at p. 706:

> "... once the state has undertaken to provide general

> short-term hospital care, as here, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights...."

and at p. 707:

> "Accordingly, we reverse and remand for entry of an order declaring Worcester City Hospital's policy against the use of its facilities in conjunction with sterilization operations unconstitutional and enjoining the individual appellees from enforcing the policy in the future."

From the foregoing opinions, *both of which are binding upon this Court,* it is clear that the policy presently being followed by the Trustees of Hale Hospital amounts to a violation of plaintiffs' rights under the equal protection clause of the Fourteenth Amendment. In view of this ruling, this Court does not reach plaintiffs' alternative contention that the Trustees' policy also violates rights to privacy asserted under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution.

This order in no way impinges upon the authority of the hospital Trustees and the Director of the hospital to make hospital facilities available to persons seeking elective abortions only on the same terms and subject to the same conditions as those imposed upon other would-be users of the hospital facilities. Nor does this order require that any individual member of the staff of Hale Hospital, or any employee of Hale Hospital, participate or assist in any way in the performance of these abortions if that person as a matter of conscience objects to so doing.

Lastly, this Court notes that in connection with the decision of the Supreme Court in *Roe* v. *Wade,* Mr. Justice White filed a dissenting opinion, joined in by Mr. Justice Rehnquist, in which Mr. Justice White observed, at p. 221:

> "With all due respect, I dissent. I find nothing in

> the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional rights for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court."

This Court regrets that it does not enjoy the freedom of accepting and rejecting described by Mr. Justice White where he said, at p. 222:

> "... I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it."

In view of the caveat spelled out in fn. 7, p. 707 of Judge Coffin's opinion in *Hathaway* v. *Worcester City Hospital, supra,* an order will be entered enjoining the Trustees of the Hale Hospital and Charles F. Stumpf, the Director, but not the City of Haverhill, from enforcing the policy of the Trustees totally proscribing elective abortions during the first trimester of pregnancy.

ANDREW A. CAFFREY, U.S.D.J.

APPENDIX C

MASSACHUSETTS DEPT. OF PUBLIC HEALTH
DIVISION OF MEDICAL CARE

ABORTIONS PERFORMED IN MASSACHUSETTS
FROM MARCH - DECEMBER, 1973

		Hospital	
	Clinics	Outpatient	Inpatient
March	0	83	465
April	44	69	405
May	243	94	556
June	290	93	478
July	292	114	531
August	480	135	466
September	876	114	391
October	1,104	100	364
November	1,207	112	352
December	1,213	151	356
TOTAL	5,749	1,055	4,364
March - August Subtotal	1,349	588	2,901
Sept. - Dec. Subtotal	4,400	467	1,463

TOTAL ABORTIONS — MARCH - DECEMBER, 1973

Clinic	5,749
Outpatient	1,055
Inpatient	4,364
	11,168

Abortions Performed in Massachusetts From January - May, 1974*

	Clinics	Hospital Outpatient	Hospital Inpatient
January	1,386	232	375
February	1,022	170	319
March	1,118	177	379
April	1,478	134	344
May	867	80	327
Total	5,871	793	1,744

Total Abortions in Massachusetts January - May, 1974*

Clinic	5,871
Outpatient	793
Inpatient	1,744
Total	8,408

Total Abortions Performed in Massachusetts Reported*

	1973**	1974***	Total
Clinics	5,749	5,871	11,620
Outpatient	1,055	793	1,848
Inpatient	4,364	1,744	6,108
Total	11,168	8,408	19,576

* Received as of 7/1/74
** March - December
*** January - May

APPENDIX D

MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH — DIVISION OF MEDICAL CARE
MASSACHUSETTS

REPORTED ABORTIONS BY HOSPITALS

City or Town	Name of Hospital	1973 Classification	# Reported Abortions 1973* IN	1973* OUT	1974** IN	1974** OUT	# Complications Reported: Procedure Perf. by Hosp. Rept. 1973*	1974**	Procedure Perf. Elsewhere than at Hosp. Rept. 1973*	1974**
Arlington	Symmes Hospital	General with Maternity	—	—	—	—	—	—	—	—
Athol	Athol Memorial Hospital	General with Maternity	—	—	—	—	—	—	—	—
Attleboro	Sturdy Memorial Hospital	General with Maternity	77	33	4	45	1	2	—	—
Andover	Nashoba Community Hospital	General with Maternity	1	—	—	—	—	—	—	—
Beverly	Beverly Hospital, Inc.	General with Maternity	—	—	—	—	—	—	—	—
Boston	Beth Israel Hospital	General with Maternity	806	23	142	156	68	26	12	3
	Boston Hospital for Women (Includes Parkway Div.)	General with Maternity	2,482	—	1,160	—	6	7	—	—
	Children's Hospital Medical Center	Pediatric and Special Adult General	—	—	—	45	—	1	—	—
	Boston City Hospital	General with Maternity	—	—	—	—	—	—	—	—
	Longwood Hospital, Inc.	General with Maternity	—	—	—	—	—	—	—	—
	Mass. General Hospital	General without Maternity & Mental	92	6	55	146	4	4	—	7
	Vincent Memorial Hospital	Gynecological and Surgical	—	—	—	—	—	—	—	—
	Mass. Osteopathic Hosp., Inc.	General without Maternity	0	10	6	7	—	—	—	—
	N.E. Baptist Hospital	General without Maternity	0	0	1	8	—	—	—	—

* 3/1/73 — 12/31/73
** Received as of 7/1/74

City or Town	Name of Hospital	1973 Classification	# Reported Abortions 1973* IN	1973* OUT	1974** IN	1974** OUT	# Complications Reported Procedure Perf. by Hosp. Rept. 1973*	1974**	Procedure Perf. Elsewhere than at Hosp. Rept. 1973*	1974**
Boston (*cont.*)	N.E. Deaconess Hospital	General without Maternity	27	50	3	12	—	—	—	—
	N.E. Medical Ctr. Hospital	General without Maternity								
		Communicable Disease & Rehabilitation	23	41	4	22	2	—	—	—
	Peter Bent Brigham Hospital	General without Maternity	95	119	43	43	7	4	1	1
	Robert Breck Brigham Hosp.	General without Maternity	0	0	0	8	—	—	—	—
	St. Elizabeth's Hosp., Inc.	General with Maternity & Neuropsychiatric	—	—	—	—	—	—	—	—
	St. Margaret's Hosp.	Maternity & Gynecological Surgery	—	—	—	—	—	—	—	—
	University Hosp., Inc.	General without Maternity, Rehabilitation, Diagnosis & Treatment of Mild Nervous Disorders	29	0	1	0	—	—	—	—
Brockton	Brockton Hospital	General with Maternity	—	—	—	—	—	—	—	—
Brookline	Brookline Hospital	General without Maternity	2	0	0	0	—	—	—	—
Cambridge	The Cambridge Hospital	General with Maternity	—	—	—	—	—	—	—	—
	Mt. Auburn Hospital	General with Maternity	8	26	0	1	—	—	—	—
Concord	Emerson Hospital	General with Maternity & Psychiatry	27	63	10	41	1	0	1	1

* 3/1/73 — 12/31/73
** Received as of 7/1/74

City or Town	Name of Hospital	1973 Classification	# Reported Abortions 1973* IN	1973* OUT	1974** IN	1974** OUT	# Complications Reported: Procedure Perf. by Hosp. Rept. 1973*	1974**	Procedure Perf. Elsewhere than at Hosp. Rept. 1973*	1974**
Danvers	Hunt Memorial Hospital	General with Maternity	20	—	—	—	—	—	1	—
Everett	Whidden Mem. Hosp., Inc.	General with Maternity	—	—	—	—	—	—	—	—
Fall River	St. Anne's Hospital, Inc.	General with Maternity	—	—	—	—	—	—	—	—
	Truesdale Hospital, Inc.	General with Maternity	5	—	—	—	—	—	1	1
	The Union Hospital	General with Maternity	—	—	—	—	—	—	—	—
Falmouth	Falmouth Hospital	General with Maternity	—	—	—	—	—	—	—	—
Fitchburg	Burbank Hospital, Inc.	General with Maternity	—	—	—	—	—	—	—	—
Framingham	Framingham Union Hosp., Inc.	General with Maternity	—	3	—	2	—	—	—	—
Gardner	Henry Heywood Mem. Hosp.	General with Maternity	—	—	—	—	—	—	—	—
Gloucester	Addison Gilbert Hospital	General with Maternity	57	—	18	—	1	—	—	—
G. Barrington	Fairview Hospital	General with Maternity	—	—	—	—	—	—	—	—
Greenfield	Franklin County Public Hosp.	General with Maternity & Rehabilitation	1	37	1	28	1	—	—	—
Haverhill	Haverhill Municipal Hospital (Hale)	General with Maternity	—	—	—	—	—	—	—	—
Holyoke	Holyoke Hospital	General with Maternity	25	2	0	6	—	—	1	—
	Providence Hospital	General with Maternity	—	—	—	—	—	—	—	—
Hyannis	Cape Cod Hospital, Inc.	General with Maternity	—	—	—	1	—	—	—	4
Lawrence	Bessie Burke Mem. Hospital	Chronic Disease	—	—	—	—	—	—	—	—
	Lawrence General Hospital	General with Maternity	—	—	—	—	—	—	—	1
Leominster	Leominster Hospital	General with Maternity	—	—	—	—	—	—	—	—

* 3/1/73 — 12/31/73
** Received as of 7/1/74

City or Town	Name of Hospital	1973 Classification	# Reported Abortions 1973* IN	OUT	1974** IN	OUT	# Complications Reported Procedure Perf. by Hosp. Rept. 1973*	1974**	Procedure Perf. Elsewhere than at Hosp. Rept. 1973*	1974**
Lowell	Lowell General Hospital	General with Maternity	15	—	14	—	2	—	1	—
	St. John's Hospital	General with Maternity	—	—	—	—	—	—	—	—
	St. Joseph's Hospital, Inc.	General with Maternity	—	—	—	—	—	—	—	—
Lynn	Lynn Hospital	General with Maternity	10	129	6	65	1	—	—	—
	Union Hospital	General with Maternity	1	—	2	—	—	—	—	—
Malden	Malden Hospital	General with Maternity	—	3	1	3	—	—	—	—
Marlborough	Marlborough Hospital	General with Maternity	6	2	4	8	—	—	1	—
Medford	Lawrence Memorial Hospital	General with Maternity	—	—	—	—	—	—	—	—
Melrose	Melrose-Wakefield Hospital	General with Maternity	39	—	8	—	1	—	—	—
Methuen	Bon Secours Hospital, Inc.	General with Maternity & Psychiatry	—	—	—	—	—	—	—	—
Middleboro	St. Luke's Hospital	General with Maternity	—	2	—	—	—	—	1	—
Milford	Milford Hospital, Inc.	General with Maternity	—	—	—	—	—	—	—	—
Milton	Milton Hospital	General with Maternity	—	—	—	—	—	—	—	—
Montague	Farren Memorial Hospital	General with Maternity	—	—	—	—	—	—	—	—
Nantucket	Nantucket Cottage Hospital	General with Maternity	—	16	—	—	—	—	1	—
Natick	Leonard Morse Hospital, Inc.	General with Maternity	—	—	—	—	—	—	—	—
Needham	Glover Memorial Hospital	General with Maternity	—	3	—	—	—	—	—	—
New Bedford	St. Luke's Hospital	General with Maternity	64	94	26	44	3	2	—	—
Newburyport	Newburyport Manor Chronic Hospital, Inc.	Chronic Disease	—	—	—	—	—	—	—	—

* 3/1/73 — 12/31/73
** Received as of 7/1/74

City or Town	Name of Hospital	1973 Classification	# Reported Abortions 1973* IN	OUT	1974** IN	OUT	# Complications Reported Procedure Perf. by Hosp. Rept. 1973*	1974**	Procedure Perf. Elsewhere than at Hosp. Rept. 1973*	1974**
Newburyport (*cont.*)	Anna Jaques Hospital	General with Maternity	—	—	—	—	—	—	2	1
Newton Lower Fall	Newton-Wellesley Hospital	General with Maternity	6	6	—	13	—	—	—	—
North Adams	North Adams Hospital, Inc.	General with Maternity	23	—	10	—	—	—	—	—
Northampton	Cooley Dickinson Hospital	General with Maternity	42	—	13	—	—	—	—	—
Norwood	Norwood Hospital	General with Maternity	17	6	8	8	—	1	—	—
Oak Bluffs	Martha's Vineyard Hospital	General with Maternity	—	—	—	—	—	—	—	—
Peabody	Josiah B. Thomas Hospital	General without Maternity	6	—	9	—	—	—	—	—
Pittsfield	Berkshire Medical Ctr. Hosp.	General with Maternity	48	—	12	—	—	—	1	1
Plymouth	The Jordan Hospital	General with Maternity	20	—	4	—	1	—	—	—
Quincy	Quincy City Hospital	General with Maternity	4	9	1	—	—	—	2	1
Revere	Grover Manor Hospital	General with Maternity & Chronic Disease	—	—	—	—	—	—	—	—
Salem	Salem Hospital	General with Maternity	—	—	—	—	—	—	—	—
Saugus	Saugus General Hospital	General with Maternity	3	27	3	17	—	—	—	—
Somerville	Somerville Hospital, Inc.	General with Maternity	—	—	—	—	—	—	—	—
Southbridge	Harrington Memorial Hosp.	General with Maternity	10	15	4	10	—	—	—	—
Springfield	Wesson Women's Hospital	Maternity & Gyn. Surgery	73	328	—	50	13	—	2	—
Stoneham	N.E. Memorial Hospital	General with Maternity	—	—	—	—	—	—	—	—
Stoughton	Goddard Memorial Hospital	General with Maternity	63	4	48	—	—	—	—	1
Taunton	Morton Hospital	General with Maternity	—	—	—	—	—	—	—	—

* 3/1/73 — 12/31/73
** Received as of 7/1/74

City or Town	Name of Hospital	1973 Classification	# Reported Abortions 1973* IN	1973* OUT	1974** IN	1974** OUT	# Complications Reported: Procedure Perf. by Hosp. Rept. 1973*	1974**	Procedure Perf. Elsewhere than at Hosp. Rept. 1973*	1974**
Waltham	Waltham Hospital	General with Maternity	19	4	14	—	1	—	2	1
Ware	Mary Lane Hospital	General with Maternity	—	—	2	1	—	—	—	—
Wareham	Tobey Hospital, Inc.	General with Maternity	5	—	—	—	—	—	—	—
Webster	Hubbard Regional Hospital	General with Maternity	—	—	—	—	—	—	—	—
Westfield	Noble Hospital	General with Maternity	—	—	—	—	—	—	—	—
Weymouth	South Shore Hospital	General with Maternity	—	—	—	—	—	—	—	—
Winchester	Winchester Hospital	General with Maternity & Rehabilitation	6	—	—	—	—	—	—	—
Woburn	Charles Choate Mem. Hosp.	General with Maternity	—	—	—	—	—	—	—	—
Worcester	Fairlawn Hospital, Inc.	General without Maternity	14	—	—	—	—	—	—	—
	The Memorial Hospital	General with Maternity	20	9	3	14	1	1	—	2
	Worcester City Hospital	General with Maternity	71	0	101	—	8	1	—	—
	Worcester Hahnemann Hosp.	General with Maternity	1	—	—	—	—	—	4	—
	St. Vincent Hospital	General with Maternity, Chronic Disease & Psychiatry	—	—	—	—	—	—	—	—

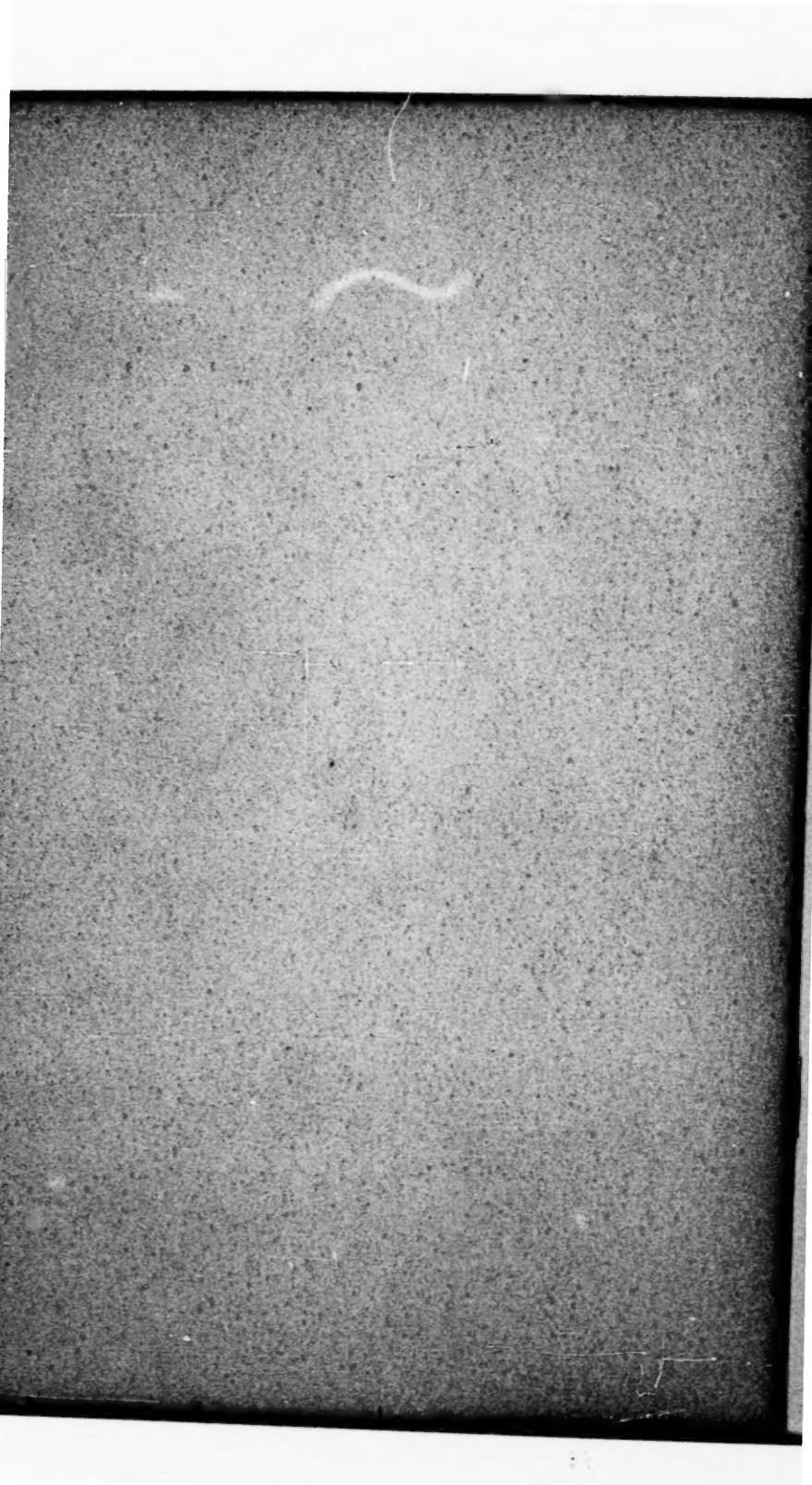
* 3/1/73 — 12/31/73
** Received as of 7/1/74

MASSACHUSETTS

REPORTED ABORTIONS BY CLINCS

City or Town	Name of Clinic	# Reported Abortions 1973* OUT	# Reported Abortions 1974** OUT	# Complications Reported: Procedure Perf. at Clinic as Reported by Clinic 1973*	Procedure Perf. at Clinic as Reported by Clinic 1974**	Procedure Perf. at Clinic as Reported by Other Facilities 1973*	Procedure Perf. at Clinic as Reported by Other Facilities 1974**
Amherst	Amherst Medical Association	192	224	1	—	—	—
Boston	Charles Circle Clinic	1,247	1,294	8	4	1	2
	Crittenton Hastings House	809	734	27	3	—	—
Brookline	Preterm	2,172	2,768	17(56)***	11(39)**	6	2
Springfield	Hampden County Ob/Gyn Association	1,329	845	10(6)***	4	—	—

* 3/1/73 — 12/31/73
** Received as of 7/1/74
*** #'s in ( ) indicate "minor complications" as reported by clinics



In the Supreme Court of the United States

OCT 2 1974

R., CLERK

OCTOBER TERM, 1974.

No. 74-289.

HALE HOSPITAL, CHARLES F. STUMPF, JOHN C. T. MacNAMARA, JOHN DROSSOS, ELLERY ATWOOD, HOMODE J. HABHAB, MARY FUTRELL, WILLIAM H. GLEED, SHELDON G. MERKER, CLIFFORD A. MILES AND ALFRED E. LAGASSE,

PETITIONERS,

v.

JANE DOE AND REBECCA ROE,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief in Opposition to Petition for a Writ of Certiorari.

JAMES C. HAMILTON,
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In the Supreme Court of the United States

October Term, 1974.

No. 74-289.

HALE HOSPITAL, CHARLES F. STUMPF, JOHN C. T. MacNAMARA, JOHN DROSSOS, ELLERY ATWOOD, HOMODE J. HABHAB, MARY FUTRELL, WILLIAM H. GLEED, SHELDON G. MERKER, CLIFFORD A. MILES and ALFRED E. LAGASSE,
Petitioners,
v.
JANE DOE and REBECCA ROE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief in Opposition to Petition for a Writ of Certiorari.

Counterstatement of Questions Presented.

Whether the Court of Appeals erred in upholding the decision of the District Court enjoining the prohibition of abortions at a public hospital where a substantial por-

tion of the surgery performed at the hospital is similar in nature to abortions and where the hospital had the staff and facilities capable of performing the operation.

Argument.

This case presents no new issues of constitutional law that may be said to have been left unsettled by this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973). *Roe* overturned state laws which prohibited elective abortions, where there were physicians willing and able to perform the operation and women anxious to have it performed. The petitioner Hale Hospital, which is concededly a public institution, seeks to act here precisely as the state acted in *Roe*. It seeks to prohibit all elective abortions when the record undeniably shows it is a hospital specializing in gynecological procedures, with personnel ready, willing and able to perform the procedure, and facilities more than adequate to the task.

In order to depict this case as one falling outside the perimeters of *Roe*, and thus worthy of Supreme Court review, petitioners have had to miscast facts seriously concerning the Hale Hospital's facilities, facts which are established by the explicit admissions of the parties, their pretrial stipulations, and the District Court's findings of fact. Notwithstanding petitioners' characterization, the outcome of this case does not turn on an "analysis of the nature of the . . . duty of health-care facilities . . . to provide [abortions]." (Petition for Writ of Certiorari [hereinafter "Petition"], p. 4.) As the Court of Appeals correctly held, any affirmative obligation of a hospital to provide abortions, while a "cert-worthy" issue, is simply not presented by the case at bar. The record could not be clearer or more complete. Indeed, so certain was the Dis-

trict Court of the applicability of *Roe* that it found the outcome of this case followed "inexorably," like the conclusion of a "syllogism whose major premise [was] *Roe*" and whose minor premise was *Hathaway* v. *Worcester City Hospital*, 475 F. 2d 701 (1st Cir. 1973), where the First Circuit applied *Roe* to a municipal hospital. (Petition, p. 22.) Therefore, we respectfully submit that this case does not warrant Supreme Court review.

1. The opinions of the District Court and of the Court of Appeals are mandated by this Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973). *Roe* stands for the proposition that there can be no blanket statutory prohibition of abortions during the first and second trimesters of pregnancy. During the second trimester of pregnancy, a woman's right to terminate her pregnancy can be impinged upon, but only in the form of regulation designed to promote the state's interest in maternal health. *Doe* v. *Bolton*, 410 U.S. 179 (1973), added the admonition that the state may not unduly burden abortion procedures with requirements inapplicable to other surgical procedures. Where a statute prohibits abortions, or sets up burdensome restrictions on them, it is clearly unconstitutional. See, *e.g.*, *Word* v. *Poelker*, 495 F. 2d 1349 (8th Cir. 1974); *Doe* v. *Rampton*, 366 F. Supp. 189 (D. Utah, 1973); *Coe* v. *Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1974).

Nor is there any doubt that a public hospital, and more particularly, a hospital specializing in gynecology, like the petitioner Hale Hospital, may not do what the state is no longer permitted to do. In *Nyberg* v. *City of Virginia*, 495 F. 2d 1342 (8th Cir. 1974), a municipal hospital was compelled to allow its physicians the use of existing facilities and supportive personnel for the performance of abortions. In *Santiago* v. *Colon*, No. 74-862 (D. P.R. August 6, 1974), the District Court of Puerto Rico, citing

to the First Circuit's decision in the instant case, arrived at the identical result. In *Hathaway* v. *Worcester City Hospital*, 475 F. 2d 701 (1st Cir. 1973), which petitioners have not cited, the First Circuit, adding equal protection concerns to the mandate of *Roe*, held that a public hospital may not prohibit sterilization where it offered surgical procedures affecting fundamental privacy interests which involved no greater risk or demand on its facilities. Only private or denominational institutions have escaped the dictates of *Roe*. See *Doe* v. *Bellin Memorial Hospital*, 479 F. 2d 756 (7th Cir. 1973). Where (1) the hospital is public, (2) it has the facilities to perform abortions, (3) it is the only hospital to offer such a procedure within its geographical region, (4) the facilities will not be additionally burdened by their performance, and (5) abortions are nevertheless prohibited, the application of *Roe* is inescapable.

The Hale Hospital qualifies on all counts. It is conceded to be a public hospital. The women who sought abortions in this case are patients of physicians on the staff of the Hale Hospital. In each case, after an examination and consultation with the patient, the physician determined that an abortion would be in the best interests of the woman, and he was ready, willing and able to perform the necessary surgery. Space and operating room time were available at the hospital for the performance of the individual operations. The abortions could not be performed solely because hospital rules and policy prohibit the performance of all abortions unless they have been approved by the hospital's Therapeutic Abortion Committee.[1]

[1] The guidelines governing decisions by the Therapeutic Abortion Committee provide that: (1) the patient must reside in the area generally served by the Hale Hospital; (2) the Committee may consider only those cases in which continued pregnancy would constitute a significant threat to the life or health of the mother—

It is the total prohibition of elective abortions, a policy which is identical to the statutory prohibition found in *Roe,* with which this lawsuit is concerned.[2] No affirmative obligation of the hospital to provide for abortions is at issue in the case at bar. At no time have the respondents asked that the hospital hire additional staff or expand its facilities in order to meet the demand for abortions within its primary service area. Rather, respondents have asked only that the ban on elective abortions be lifted and that abortions be treated like all other elective operations within the hospital.[3] This Court's decision in *Roe* surely requires nothing less.

It is undisputed that the hospital has the capacity to perform abortions. Indeed, shortly after this Court's decision in *Roe,* and prior to the onset of the instant litigation, petitioners made explicit admissions to this effect. Having been asked by the hospital's trustees to specifically evaluate the adequacy of the hospital for the performance of abortions, on February 22, 1972, the executive committee of the hospital's medical staff found that:

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where the threat is based on a physical condition the patient must be examined by a specialist in internal medicine, and where there is a threat to the mental health of the patient, she must have a documented history of mental illness and must be examined by two psychiatrists; (3) the abortion must be approved by a majority of the three-member Therapeutic Abortion Committee.

[2] The Texas statute at issue in *Roe* made it a crime to "procure an abortion" or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." 410 U.S. at 117, 118.

[3] This was precisely the relief ordered by the District Court. The court stated that its order "in no way impinges upon the authority of the hospital Trustees and the Director of the hospital to make hospital facilities available to persons seeking elective abortions only on the same terms and subject to the same conditions as those imposed upon other would-be users of the hospital's facilities." (Petition, p. 25.)

1. adequate medical staff expertise for the performance of elective abortions exists among those staff members with appointment to the Department of Obstetrics and Gynecology, and privileges for the performance of elective abortions should be extended to such staff members;

2. the physical facilities of the Hale Hospital are adequate for the performance of the involved procedures;

3. supportive hospital personnel (nursing, anaesthesia, etc.) have adequate capacities with regard to the procedures involved; and

4. the already existing hospital regulations and practices with regard to operative patients incorporate the guidelines promulgated by the Department of Public Health. (Petition, p. 21.)

A draft abortion policy was recommended and later accepted by the trustees of the hospital. They then voted to defer implementation of the abortion policy pending legal clarification of the proposed guidelines for abortions. Much later, at the behest of the Haverhill city council, and after litigation commenced, they voted to rescind their approval. (Petition, pp. 19-20.)

From the record, it is abundantly clear that the decision to defer implementation of the policy, and later wholly to prohibit abortions, was not based upon considerations of the hospital's inadequacies. At no time prior to the filing of this lawsuit was there any discussion by the trustees or by the medical staff of the hospital's deficiencies. Indeed, the trustees, who were presumptively aware of the hospital's limitations, concurred in the executive committee's finding that the hospital could readily accom-

modate abortion patients when they initially voted to permit abortions.[4]

Nor are those findings unjustified. With the possible exception of a clinic established for the sole purpose of performing abortions, it is difficult to imagine a facility better suited to providing this service than the Hale Hospital. While the hospital provides a wide range of surgical and medical services, the most important area of specialization at the hospital, measured in terms of the number of procedures performed, is obstetrics and gynecology, which accounts for 40 to 45 per cent of the surgery done there. One of the hospital's four operating rooms is reserved for the exclusive use of the Department of Obstetrics and Gynecology. In terms of the complexity of the procedure and the demand on the hospital's staff and facilities, there is little to distinguish an abortion performed during the first three months of pregnancy from other procedures which are routinely performed at the hospital. In fact, the surgical procedure most frequently performed at the hospital is a dilation and curettage—the exact procedure used to terminate a pregnancy during the first three months. (Petition, pp. 20, 21, 22.)

As the District Court found, nothing in the record supports the claim made by the petitioners that the Hale Hos-

[4] *Roe* v. *Wade* was decided on January 22, 1973. On February 22, 1973, the executive committee of the petitioner hospital's medical staff voted to approve the findings described above and a draft abortion policy. The hospital's trustees voted to accept that policy on March 29, 1973. Implementation of the policy was, however, deferred on that date and again on April 9, 1973, in order to clarify several questions concerning the rights of a father and of parents of minors. It was during this period that abortions which had been requested by the plaintiffs' doctors were refused. A total ban on elective abortions was not imposed until June 26, 1973, shortly after this litigation commenced. The elaborate presentation of the hospital's deficiencies occurred only during the trial of this case on July 31, 1973. (Petition, p. 19.)

pital cannot accommodate whatever additional demand on its facilities would result from invalidating the hospital ban on elective abortions. The "occupancy rate" of 95 to 96 per cent cited by the petitioners refers to the availability of bed space in the hospital. And it is the lack of bed space which is the principal reason for the cancellation of scheduled surgical procedures. An abortion performed during the first trimester of pregnancy, however, is usually an outpatient procedure, which in no way requires that the patient occupy bed space in the hospital. An increase in the number of abortions performed at the hospital would not therefore strain the available bed space in any appreciable way. (Petition, pp. 20, 21.) Similarly, while it is true that hospital personnel have the right to refuse to participate in the performance of an abortion for religious or moral reasons, the record is barren of any evidence indicating that the exercise of this right has caused or could cause in the future the "serious personnel scheduling problems" to which the petitioners allude.

Indeed, the petitioners' position on the hospital's resources has been inconsistent. On the one hand, petitioners have recited the overall deficiencies of the hospital and its inability to meet the increased demand on its facilities that the provision of elective abortions would entail. On the other hand, in support of their argument that the right to have an abortion is not significantly impeded by the Hale Hospital's ban, they suggest that the ready availability of abortions in Boston, which is a significant distance from Haverhill, would have the effect of diminishing the demand for abortions at the Hale Hospital. In any event, since the actual demand for abortions at the hospital has been considerably less than was anticipated at the time of trial, there is no reason to believe that the hos-

pital's facilities are not fully adequate to meet that demand.[5]

It is not disputed that the outpatient facilities at the Hale Hospital, like the outpatient facilities at most other hospitals, are sometimes crowded and that this overcrowding occasionally results in inconvenience to patients. However, unless these deficiencies are likely to endanger the lives of pregnant women, the only permissible ground under *Roe* for prohibiting abortion, they are of no constitutional significance. Moreover, whatever the overall shortcomings of the hospital, and there is considerable dispute as to what they are, it is clear that the hospital trustees may not "cure" these deficiencies by singling out for prohibition one kind of procedure from the wide range of gynecological surgery done at the hospital. A finding of limited resources or inconvenience would then provide a consistent excuse for eliminating "socially disfavored" operations, such as abortions. To permit such a tenuous justification for banning abortions would be to overrule *Roe* v. *Wade, sub silentio.*

2. The most astounding proposition put forward by the petitioners is that the hospital's policy is part of a regulatory scheme designed to allocate medical resources. "The purpose and the effect of the regulation . . . is not to prohibit or restrict the performance of abortions but to permit a shift of this extra caseload from a facility which cannot accept it to other facilities within the state which can." (Petition, pp. 6-7.)

[5] Based on the number of births at the hospital, it was estimated that there would be a demand for 300 abortions per year. During the two months following the District Court's decision, only twelve abortions were performed at the Hale Hospital, according to petitioners' doctors, Dr. Baratt and Dr. Kraus.

The record in this case is absolutely devoid of any evidence to support this characterization. The deliberations of the trustees reflect no such concerns. There was no evidence to indicate that the hospital contemplated referral of women seeking abortions to other facilities. No attempt was made to refer the named plaintiffs to other facilities. There is no agreement with any other hospital providing for such referral, nor any indication that other hospitals might be willing and able to accept such cases. In the absence of any evidence showing that the hospital had acted in good faith to assist women in obtaining abortions, the depiction of their action as regulatory is disingenuous, at the very least.[6]

In any event, the trustees of the hospital do not have the authority to "regulate" or "allocate" the facilities of other hospitals. While it might be permissible in certain cases for a governmental body with appropriate regulatory authority to allocate medical resources on a nondiscriminatory basis, it is clear that the trustees of the Hale Hospital, acting unilaterally and in a summary, arbitrary fashion, may not.

There was in fact no rational allocation of medical resources in this case. As the District Court found, no other facilities in the Hale Hospital's "primary service area" are performing elective abortions. (Petition, p. 22.) The decision to ban elective abortions at the Hale Hospital, notwithstanding this fact and the plain adequacy of the hospital's facilities, is not a permissible regulation or allocation of medical resources. It is a clear and unconstitutional prohibition.

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[6] Indeed, at trial, petitioners repeatedly pointed to the absence of any nearby facilities willing and able to perform abortions as a justification for *not* providing abortions. They sought to dramatize the massive demand for abortions that the Hale Hospital would be forced to meet, notwithstanding the limited nature of respondents' requests for relief.

Conclusion.

For the reasons stated, respondents respectfully submit that the Court should deny this petition for a writ of certiorari and affirm the decision of the Court of Appeals and the judgment and order of the District Court.

Respectfully submitted,

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